A

Yeoh Eng Kong v Choo Kok Yeow & Anor

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–1039 OF 2007
SU GEOK YIAM J
1 MARCH 2018

C

Damages — Assessment — Damages in lieu of specific performance — Trial judge found plaintiff had unlawfully terminated agreement ('SPA') for sale of property to defendants and ordered former to pay latter damages in lieu of specific performance as assessed by court registrar ('DR') — Defendants claimed as their loss the difference between the purchase price in the SPA and the auctioned price — Whether the said claim was the proper measure of damages — Whether the auctioned price was the market value the defendants would have obtained for the property had the plaintiff fully performed the SPA — Whether DR erred in holding that the defendants' claim constituted special damages which the defendants had failed to plead and therefore were not entitled to — Whether DR's decision not to award any damages to the defendants defeated/overrode the order of the trial judge

D

E

The defendants entered into an agreement ('SPA') to buy the plaintiff's dilapidated bungalow for RM2.8m. The property was at the time subject to a charge in favour of the plaintiff's financier bank. Simultaneous with the execution of the SPA and payment by the defendants of a deposit towards the purchase price, the plaintiff gave vacant possession of the property to the defendants free from rental to carry out remedial/renovation works for which the defendants incurred a total sum of RM605,000. Before the SPA could be completed, the plaintiff terminated the agreement on the ground of frustration. The defendants disputed the termination and asserted that the SPA was valid and subsisting. The plaintiff filed the instant suit seeking, inter alia, a declaration that he had lawfully terminated the SPA on the ground of frustration. The defendants resisted the claim and counterclaimed for, inter alia, specific performance of the SPA and general damages for wrongful termination. Before the trial of the suit could be completed, the property was sold by public auction at RM3,650,000 at the instance of the plaintiff's financier. The trial court later held that the termination of the SPA was unlawful, dismissed the plaintiff's claim, allowed the counterclaim and ordered the plaintiff to pay the defendants damages in lieu of specific performance pursuant to s 18(5) of the Specific Relief Act 1950, and also general damages for wrongful termination, as assessed by the registrar of the court. The defendants filed a notice for assessment of damages ('encl 85') before the deputy registrar ('DR') claiming the said RM605,000 remedial costs,

F

G

H

I

RM78,000 they had paid for stamp duty on the memorandum of transfer, and RM850,000 (being the difference between the auctioned price and the purchase price in the SPA) as the loss of value of the property. The DR dismissed encl 85 without awarding any damages to the defendants ruling that: (a) the RM850,000 claim for loss of value of the property was a claim for loss of profit which disentitled the defendants from claiming for the stamp duty and remedial costs; and (b) since the RM850,000 claim was actually a special damages claim and the defendants had not specifically pleaded it, they were not entitled to it. In the instant appeal against the DR's decision to the judge-in-chambers, the defendants argued that the DR erred in construing the RM850,000 claim as a special damages claim rather than a claim for damages in lieu of specific performance.

Held, allowing the appeal, setting aside the decision of the DR, ordering the plaintiff to pay the defendants RM850,000 as damages in lieu of specific performance of the SPA with interest thereon at 5%pa from 18 October 2016 until full settlement:

(1) In dismissing encl 85, the DR acted on a wrong principle of law which resulted in a serious miscarriage of justice. The RM850,000 claim was not a claim for special damages but a claim for damages in lieu of specific performance of the SPA (paras 22–23 & 98).

(2) The defendants relied on the auction price of the property as indicative of its market value as at the date of the judgment of the High Court ordering the damages to be assessed. Therefore, the DR ought to have derived the amount of loss suffered by the defendants by deducting the purchase price from the auction price and, consequently, should have allowed the RM850,000 claim. The sum of RM850,000 was the proper measure of damages as a substitute for the relief of specific performance as payment of that sum would have put the defendants in the position they would have been in had the plaintiff completed the SPA and transferred the property to them pursuant to the SPA, namely, they would have become the new owners of the property valued at RM3,650,000. The RM850,000 was clearly a loss which flowed directly and naturally from the plaintiff's unlawful refusal to complete the SPA. Hence, the defendant's claim for the said amount could not be said to be a claim for special damages (see paras 33 & 39–40).

(3) The DR's decision to not grant any form of damages to the defendants had the effect of dismissing their claim for damages in lieu of specific performance and that was tantamount to defeating or overriding the order of the trial judge ordering the plaintiff to pay the defendants damages in lieu of specific performance and directing the registrar to assess the same (see paras 46–49).

(4) The plaintiff was not entitled to any equitable right of set off not only because it was not pleaded as required by O 18 r 17 of the Rules of Court 2012 — which omission was fatal — but also because a person should not benefit from his own wrong. The trial court had held that the plaintiff's termination of the SPA was unlawful and dismissed his claim. In such a situation, the plaintiff ought not to be permitted to take advantage of his own breach by raising an alleged claim for set off (see paras 75–76 & 78–79).

[Bahasa Malaysia summary

Defendan-defendan telah memasuki perjanjian ('PJB') untuk membeli banglo usang plaintif berjumlah RM2.8 juta. Hartanah tersebut pada masa itu tertakluk kepada satu gadaian yang menyebelahi bank kewangan plaintif. Pada masa sama dengan penyempurnaan PJB itu dan bayaran kepada defendan-defendan untuk deposit bagi harga belian, plaintif telah menyerahkan milikan kosong hartanah itu kepada defendan-defendan bebas daripada sewa untuk menjalankan kerja pembaikan/pengubahsuaian yang mana defendan telah menanggung jumlah keseluruhan RM605,000. Sebelum PJB dapat diselesaikan, plaintif telah menamatkan perjanjian itu atas alasan kekecewaan. Defendan-defendan mempertikaikan penamatan itu dan menegaskan bahawa PJB itu adalah sah dan masih wujud. Plaintif telah memfailkan guaman ini memohon, antara lain, satu deklarasi bahawa dia telah menamatkan secara sah PJB itu atas alasan kekecewaan. Defendan-defendan menolak tuntutan itu dan menuntut balas untuk, antara lain, pelaksanaan spesifik PJB itu dan ganti rugi am untuk penamatan salah. Sebelum perbicaraan guaman itu selesai, hartanah itu telah dijual melalui lelongan awam pada RM3,650,000 oleh pembiaya plaintif. Mahkamah perbicaraan kemudian memutuskan bahawa penamatan PJB itu menyalahi undang-undang, menolak tuntutan plaintif, membenarkan tuntutan balas dan memerintahkan plaintif membayar defendan-defendan ganti rugi sebagai ganti pelaksanaan spesifik menurut s 18(5) Akta Relief Spesifik 1950, dan juga ganti rugi am untuk penamatan salah, sebagaimana ditaksir oleh pendaftar mahkamah. Defendan-defendan telah memfailkan notis untuk taksiran ganti rugi ('lampiran 85') di hadapan timbalan pendaftar ('TP') menuntut RM605,000 tersebut untuk kos pembaikan, RM78,000 yang telah dibayar oleh mereka untuk duti setem memorandum pindah milik, dan RM850,000 (iaitu perbezaan antara harga lelong dan harga belian dalam PJB) sebagai kerugian untuk nilai hartanah itu. TP telah menolak lampiran 85 tanpa mengawardkan apa-apa ganti rugi kepada defendan-defendan dengan memutuskan bahawa: (a) tuntutan RM850,000 untuk kerugian nilai hartnah adalah tuntutan untuk kerugian keuntungan yang tidak memberi hak kepada defendan-defendan menuntut duti setem dan kos pembaikan; dan (b) oleh kerana tuntutan RM850,000 itu sebenarnya ganti rugi khas dan defendan-defendan tidak memplinya secara spesifik, mereka tidak berhak terhadapnya. Dalam rayuan ini terhadap keputusan TP kepada hakim dalam

kamar, defendan-defendna berhujah bahawa TP telah tekhilaf kerana mentafsir tuntutan RM850,000 sebagai ganti rugi khas dan bukan tuntutan untuk ganti rugi sebagai ganti pelaksanaan spesifik.

Diputuskan, membenarkan rayuan, mengetepikan keputusan TP, memerintahkan plaintif membayar defendan-defendan RM850,000 sebagai ganti rugi sebagai ganti pelaksanaan spesifik PJB dengan faedah pada 5% setiap tahun dari 18 Oktober 2016 sehingga penyelesaian penuh:

(1) Dalam penolakan lampiran 85, TP telah bertindak atas prinsip undang-undang salah yang mengakibatkan ketidakadilan serius berlaku. Tuntutan RM850,000 bukan tuntutan untuk ganti rugi khas tetapi tuntutan untuk ganti rugi menggantikan pelaksanaan spesifik PJB (lihat perenggan 22–23 & 98).

(2) Defendan-defendan bergantung kepada harga lelongan hartanah itu sebagai petanda nilai pasarannya pada tarikh penghakiman Mahkamah Tinggi memerintahkan ganti rugi ditaksir. Oleh demikian, TP patut memperoleh jumlah kerugian yang dialami oleh defendan-defendan dengan memotong harga belian daripada harga lelongan itu dan akibatnya, patut membenarkan tuntutan RM850,000 itu. Jumlah RM850,000 adalah ukuran ganti rugi sebagai menggantikan relief untuk pelaksanaan spesifik kerana bayaran untuk jumlah itu akan meletakkan defendan dalam kedudukan yang mungkin dialami mereka jika plaintif telah menyelesaikan PJB tersebut dan memindahkan hartanah itu kepada mereka menurut PJB tersebut, iaitu, mereka mungkin menjadi pemilik baru hartanah bernilai RM3,650,000. Jumlah RM850,000 adalah jelas kerugian secara langsung dan semulajadi daripada penolakan plaintif yang menyalahi undang-undang untuk menyelesaikan PJB tersebut. Justeru, tuntutan defendan untuk jumlah tersebut tidak boleh dikatakan sebagai tuntutan ganti rugi khas (lihat perenggan 33 & 39–40).

(3) Keputusan TP untuk tidak memberikan apa-apa bentuk ganti rugi kepada defendan-defendan mempunyai kesan menolak tuntutan mereka untuk ganti rugi menggantikan pelaksanaan spesifik dan itu sama seperti menggagalkan atau mengatasi perintah hakim perbicaraan memerintahkan plaintif membayar defendan-defendan ganti rugi sebagai ganti pelaksanaan spesifik dan mengarahkan pendaftar mentaksir yang sama (lihat perenggan 46–49).

(4) Plaintif tidak berhak kepada apa-apa hak penepian bukan sahaja kerana ia tidak dipli sebagaimana dikehendaki oleh A 18 k 17 Kaedah-Kaedah Mahkamah 2012 — yang mana peninggalan adalah memudaratkan — tetapi juga kerana seseorang itu tidak patut mendapat manfaat daripada perbuatan salahnya sendiri. Mahkamah perbicaraan telah memutuskan bahawa penamatan PJB plaintif menyalahi undang-undang dan menolak

tuntutannya. Dalam keadaan sedemikian, plaintif tidak patut dibenarkan mengambil kesempatan atas pelanggarannya sendiri dengan menimbulkan tuntutan yang dikatakan itu untuk penepian (lihat perenggan 75–76 & 78–79).]

Notes

For cases on assessment in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 295–348.

Cases referred to

Anglia Television Ltd v Reed [1972] 1 QB 60, CA (refd)
Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd [2014] 5 MLJ 491, CA (refd)
Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors [2014] 8 MLJ 314, HC (refd)
CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin [2010] 9 MLJ 176, HC (refd)
Commonwealth of Austrialia v Amann Aviation Pty Ltd (1991) 174 CLR 64, HC (refd)
Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57, CA (refd)
Ho Weng On & Anor v Bindev Sdn Bhd [2007] 7 MLJ 607; [2007] 10 CLJ 277, HC (refd)
Joseph bin Paulus Lantip & Ors v Unilever Plc [2018] Supp MLJ 151; [2012] 7 CLJ 693, FC (refd)
Lee Tiow Kee & Anor v Ng Geok Hwa [2017] 4 MLJ 92, CA (refd)
Minty Holdings Sdn Bhd v JB Properties Sdn Bhd (SK Brothers Realty, third party) [1998] 7 MLJ 182, HC (refd)
Nancy Simon d/o SP Simon v Peninsular Park Sdn Bhd [2008] 7 MLJ 625; [2008] 10 CLJ 328, HC (refd)
Riviera Promotions Sdn Bhd v Genting Perkasa Sdn Bhd & Ors [2012] MLJU 875, CA (refd)
Robinson v Harman (1848) 1 Exch 850 (refd)
See Kui Seng Realty Sdn Bhd v Sam Yep Foo & Anor [2014] 1 MLJ 410, CA (refd)
Topaiwah v Salleh [1968] 1 MLJ 284, FC (refd)
UOB Kay Hian Pte Ltd v MA Boon Lan [2014] 1 MLJ 874, CA (refd)

Legislation referred to

Contracts Act 1950 s 74
Rules of Court 2012 O 18 r 17, O 59 r 7(4)
Rules of the High Court 1980 O 22A
Specific Relief Act 1950 s 18, 18(1), (2), (4), (5)

Navinder Singh a/l Jasbir Singh (AJ Ariffin, Yeo & Harpal) for the plaintiff.

Vanaja Dewi a/p CP Padmanabhan Nambiar (Isharidah, Ho, Chong & Menon) for the defendants.

Su Geok Yiam J:

NOTICE OF APPEAL TO JUDGE-IN-CHAMBERS, ENCL 115

[1] Enclosure 115 is a notice of appeal to the judge-in-chambers filed by the appellants/defendants ('the defendants') against the decision of the learned deputy registrar ('DR') given on 25 January 2017 dismissing all the three claims of the defendants in encl 85 with no order as to costs.

[2] Enclosure 85 is the defendants' notice of assessment of damages in lieu of specific performance and also general damages for wrongful termination against the respondent/plaintiff ('the plaintiff').

DECISION OF THE COURT DATED 20 SEPTEMBER 2017

[3] On 20 September 2017, I allowed encl 115 with costs.

[4] I set aside the decision of the learned DR dated 25 January 2017. I ordered the plaintiff to pay to the defendants a sum of RM850,000 as damages in lieu of specific performance of the SPA together with interest thereon at the rate of 5%pa from the date of judgment on 18 October 2016 until full settlement and costs.

[5] Ms Vanaya Nambiar, learned counsel for the defendants, then prayed for a sum of RM15,000 as costs on the ground that she had put in a lot of work for the hearing of encl 115, vis the notice of assessment of damages, by the learned DR.

[6] Mr Navinder Singh, learned counsel for the plaintiff proposed 1/2 of that amount, vis a sum of RM7,500, as costs.

[7] I ordered the plaintiff to pay a sum of RM15,000 as costs to the defendants as I was of the view that it was a reasonable amount of costs that the plaintiff ought to pay to the defendants for the amount of work, which was put in by Ms Vanaya Nambiar, learned counsel for the defendants, for encl 85 and encl 115.

[8] I further ordered the senior asisstant registrar to issue the allocatur certificate in accordance with O 59 r 7(4) of the Rules of Court 2012 ('the RC 2012'). I, finally, ordered that the allocatur fee must be paid before the fair copy of the order made on that day could be filed in the court.

[9] Mr Navinder Singh, learned counsel for the plaintiff, then prayed orally for a stay of execution of my decision pending the filing of an appeal to the Court of Appeal.

[10] Upon the objection of Ms Vanaya Nambiar, learned counsel for the defendants, I dismissed the oral application for stay as the plaintiff did not show any special circumstances to justify the granting of a stay of execution of my decision pending the filing of an appeal to the Court of Appeal.

REASONS FOR DECISION OF THE COURT DATED 20 SEPTEMBER 2017

[11] Below are the reasons why the court decided in that manner.

BACKGROUND FACTS

[12] I shall first deal with the background facts, which led to the filing of encl 115 by the defendants. These background facts are as follows:

(a) on 17 November 2006, Choo Kok Yeow, the first defendant, and Michelle Kwok Mei Lin, the second defendant, who are husband and wife, entered into a sale and purchase agreement with the plaintiff to purchase the plaintiff's property for a purchase price of RM2,800,000 ('the SPA');

(b) the plaintiff's property is a detached house at No 43, Jalan Setiabakti, Bukit Damansara, 50490 Kuala Lumpur and held under HS (D) 46076, Lot 45254, Mukim Kuala Lumpur, in the District of Kuala Lumpur, Federal Territory ('the subject property');

(c) the defendants had purchased the subject property on an 'as is where is basis' with full knowledge as to the state and condition of the subject property;

(d) in the sale and purchase of the subject property, the plaintiff was represented by solicitors, namely, Messrs Lim Yeoh & Partners ('the plaintiff's conveyancing solicitors') and the defendants were represented by solicitors, namely, Messrs Rahman Too & Co ('the defendants' solicitors');

(e) the defendants had full knowledge that the subject property was charged to Alliance Bank Malaysia Bhd ('the plaintiff's financier');

(f) the defendants had purchased the property with the assistance of a RM2,000 loan from the Hong Leong Bank ('the defendants' financier');

(g) during the subsistence of the SPA, the following events took place:

(i) upon the payment of the differential sum of RM560,000 and as

requested by the defendants, the extended completion date of 16 March 2007 of the SPA was extended to 17 April 2007 subject to the imposition of a late payment interest of 8%pa on the balance purchase price, which was never paid by the defendants;

(ii) a sum of RM78,000 was paid by the defendants for the stamp duty for the memorandum of transfer ('the MOT') of the subject property;

(iii) as the property was in a dilapidated state, simultaneous with the execution of the SPA and the payment of the 10% deposit of the purchase price, vis a sum of RM240,000, by the defendants to the plaintiff, the plaintiff gave vacant possession of the property to the defendants free from rental to carry out remedial/renovation works on the subject property;

(iv) the defendants carried out the remedial/renovation works on the property and incurred costs of RM605,000; and

(v) by reason of the ex-parte injunction dated 22 March 2007 (see TAB-1 of the plaintiff's additional bundle of documents), granted in the Kuala Lumpur High Court Civil Suit No S4–22–215 of 2007 at the insistence of one Shantakumar Santhalingam ('the third party') the performance of the SPA was deferred;

(h) subsequently, before the completion of the SPA, the plaintiff terminated the SPA vide a notice of termination dated 3 August 2007 on the ground of frustration but the termination was disputed by the defendants, who took the position that the SPA was still in force and valid;

(i) on 7 September 2007, the plaintiff filed the instant suit against the defendants in the Kuala Lumpur High Court to seek for, inter alia, a declaration that the SPA was, lawfully, terminated on the ground of frustration;

(j) the plaintiff alleged that the SPA was frustrated due to intervening events without any fault on the plaintiff's part thereby discharging the plaintiff from further performance of the SPA;

(k) the suit was filed through the plaintiff's solicitors, namely, Messrs Logan Sabapathy & Co ('the plaintiff's solicitors'), vide a writ of summons dated 7 September 2007 ('the writ'), encl 1, endorsed with a claim dated 7 September 2007 ('the plaintiff's claim'), against the defendants;

(l) the defendants resisted the plaintiff's claim on the basis that the termination of the SPA was unlawful and the defendants counterclaimed against the plaintiff for, inter alia, specific performance of the SPA and also general damages for wrongful termination;

(m) the ex parte injunction was extended from time to time until it was set aside on 13 July 2009 and that setting aside was, subsequently, upheld by the Court of Appeal on 31 March 2011;

(n) before the above case was heard and concluded, the subject property was sold by way of public auction by the plaintiff's financier on 14 March 2011 for a sum of RM3,650,000 ('the auction price');

(o) subsequently, by letter dated 16 August 2011, the defendants applied to the collector of stamp duty through the defendants' solicitors, to refund in full the amount of stamp duty paid on the MOT;

(p) on 26 September 2011, the collector rejected the defendants' application on the ground that the application for refund was not made within 12 months from the date of the sale of the subject property;

(q) the plaintiff's suit proceeded for trial and on 31 July 2012, the learned trial judge, a judicial commisioner, found that the termination of the SPA was unlawful;

(r) consequently, the plaintiff's claim was dismissed by the Kuala Lumpur High Court on 31 July 2012;

(s) as the subject property had been sold by public auction, the learned trial judge also allowed the defendants' counterclaim and ordered, inter alia, the plaintiff to pay the defendants damages in lieu of specific performance pursuant to s 18(5) of the Specific Relief Act 1950 and also general damages for wrongful termination, to be assessed by the registrar ('the decision of the learned trial judge');

(t) being dissatisfied with the decision of the learned trial judge, the plaintiff filed an appeal to the Court of Appeal against the decision of the learned trial judge;

(u) on 25 October 2013, the Court of Appeal, unanimously, dismissed the plaintiff's appeal and upheld the decision of the learned trial judge;

(v) in the grounds of judgment of the Court of Appeal, the Court of Appeal said as follows:

> For the above reasons we found the learned Judicial Commissioner had not committed any error of law in awarding damages to the defendants for both damages in lieu of specific performance under s 18(5) of the Specific Relief Act 1952 and general damages for wrongful termination of the SPA.
>
> (See the judgment of the Court of Appeal at TAB-2 of the plaintiff's additional bundle of documents);

(w) on 31 October 2013, the plaintiff's conveyancing solicitors returned the 10% deposit in the sum of RM240,000 to the defendants' solicitors and the plaintiff further returned the differential sum of RM560,000 to the defendants on 20 August 2014;

(x) the plaintiff then applied vide a notice of motion to the Federal Court for leave to appeal against the decision of the Court of Appeal but it was dismissed by the Federal Court on 31 May 2016;

(y) after the dismissal of the plaintiff's appeal by the Court of Appeal, on 18 November 2013, and pursuant to the decision of the Court of Appeal, the defendants filed a notice for assessment of damages in lieu of specific performance of the SPA, encl 85), which came up for hearing on 12 and 13 February 2015 before the learned DR;

(z) during the hearing of encl 85, vis the assessment of damages, before the learned DR, the parties adduced viva voce evidence through their, respective, witnesses;

(aa) in encl 85, the defendants claimed for the following items of damages:

(i) a sum of RM605,000 being the costs and expenses incurred for the remedial/renovation works carried out on the property ('the first claim for remedial costs');

(ii) a sum of RM78,000 being the stamp duty paid on the MOT ('the second claim for the stamp duty'); and

(iii) a sum of RM850,000, which is the difference between the auction price and the purchase price of the subject property, being the loss of value of the subject property ('the third claim for loss of value of the subject property');

(ab) at the hearing of encl 85, the following bundles were marked:

(i) bundle of pleadings — 'A';

(ii) the defendants' bundle of documents — 'B';

(iii) the plaintiff's bundle of documents — 'C'; and

(iv) the plaintiff's additional bundle of documents — 'D';

(ac) in addition to the above, the following documents were also, individually, marked as exhibits during the hearing of encl 85:

(i) proclamation of sale — 'D1' (see p 33, Bundle B);

(ii) MOT — 'D2' (see pp 16–19, Bundle B);

(iii) quotation — 'D3' (see pp 22–25, Bundle B); and

(iv) receipts — 'D4' (see pp 26–32, Bundle B);

(ad) after the conclusion of the hearing of encl 85, the parties filed the following submissions:

(i) the defendants' written submissions dated 19 March 2015;

(ii) the plaintiff's submissions dated 31 March 2015;

(iii) the defendants' submissions-in-reply dated 7 May 2015 to the plaintiff's submissions dated 31 March 2015;

(iv) the plaintiff's submissions-in-reply dated 13 May 2015;

(v) the plaintiff's written supplemental submissions dated 14 December 2015; and

(vi) defendants' submissions-in-reply dated 8 January 2016 to the plaintiff's written supplemental submissions;

(ae) subsequently, on 25 January 2017, which was more than a year after the hearing of the assessment of damages, the learned DR delivered his decision providing grounds wherein he dismissed encl 85 without awarding any damages to the defendants and without any order as to costs (see the grounds of judgment of the learned DR dated 25 January 2017); and

(af) hence, the defendants filed this appeal, encl 115.

DR's two grounds for not awarding any damages to the defendants

[13] The learned DR gave two grounds for not awarding any damages to the defendants.

[14] The DR's first ground is that the defendants' claim, being a claim for the loss of value of the subject property, is, actually, a claim for loss of profit, which disentitles the defendants to claim for stamp duty and the remedial costs, both of which are claims for wasted expenditure.

[15] The learned DR's second ground is that the defendants' claim for the loss of value of the subject property, is, actually, a claim for special damages, which must be pleaded in the defendants' statement of defence and counterclaim otherwise it cannot be claimed. However, since this was not done by the defendants, the learned DR was of the view that the defendants were not entitled to the third claim for the sum of RM850,000.

[16] In his decision, the learned DR agreed with the plaintiff's solicitors' submissions that the defendants' claim for the loss of value of the subject property 'ought to be construed as a claim for special damages and not general damages as the defendants had full knowledge that the subject property was

sold by way of public auction on 14 March 2011 for a sum of RM3,650,000 and, by reason thereof, the defendants had every opportunity to specifically plead and pray for their third claim by way of an amendment to their statement of defence and counter claim dated 29 October 2017'.

The defendants' two grounds of appeal in encl 115

[17] In encl 115, the defendants relied on two grounds of appeal against the learned DR's decision dated 25 January 2017.

[18] The two grounds of appeal are as follows:

(a) the defendants' claim for the loss of value of the property is a claim for damages in lieu of specific performance and not a claim for special damages; and

(b) the learned DR was only required to assess and decide on the quantum of damages in lieu of specific performance to be awarded to the defendants in accordance with the decision of the learned trial judge dated 31 July 2012 and the learned DR was in no position to override the decision of the learned trial judge dated 31 July 2012.

ISSUES FOR THE DETERMINATION OF THE COURT

[19] I shall now deal with the issues for the determination of the court in this appeal.

[20] Based on the submissions of the defendants and the plaintiff, there are six issues for the determination of the court.

[21] They are as follows:

(1) whether the defendants' claim for the sum of RM850,000, which is the difference between the auction price and the purchase price of the subject property, being the loss of value of the subject property, is a claim for damages in lieu of specific performance or a claim for special damages?

(2) whether the learned DR can override the decision of the trial Judge dated 31 July 2012?

(3) whether the DR's delay of more than a year in rendering his decision on the assessment of damages has compromised his ability to decide encl 85?

(4) whether the stamp duty paid by the defendants for the MOT and the remedial costs incurred by the defendants for the subject property are wasted expenditure?

(5) whether the plaintiff is entitled to the equitable right of set off of a sum of RM738,814.83, being the total of the simple and compound interest, which have accrued from 28 April 2009–31 July 2011 plus 1% default interest for the same period; of a sum of RM200,066.84, being the shortfall from the auction of the subject property on 14 March 2011; and a sum of RM779,000, being the rental for the subject property at the rate of RM19,000 per month from September 2007 to February 2011? and

(6) whether the plaintiff can raise two new issues in the hearing of encl 115?

Issue (1): Whether the defendants' claim for the sum of RM850,000, which is the difference between the auction price and the purchase price of the subject property, being the loss of value of the property, is a claim for damages in lieu of specific performance or a claim for special damages?

[22] On issue (1), I found that the defendants' claim for a sum of RM850,000, being the loss of value of the property, which is the defendants' third claim in encl 115, is a claim for damages in lieu of specific performance, being the amount of damages to be awarded to them to compensate them for the loss suffered by them due to the unlawful termination of the SPA by the plaintiff and the subsequent auction of the subject property.

[23] I found that the DR had misdirected himself on the law when he held that the defendants' claim for the sum of RM850,000, which is the difference between the auction price and the purchase price of the subject property, to be a claim for special damages. Hence, he erroneously decided that based on the trite law of pleading for special damages, it ought to be pleaded before it could be allowed by him.

[24] In coming to this conclusion, I noted that the learned DR agreed with the submission of the plaintiff's learned counsel, who had relied on two cases to support his contention that the defendants' claim of a sum of RM850,000 is a claim for special damages. The two cases are as follows:

(a) *CH Choo & Sons Sdn Bhd v Wong Nyuk Shing @ Wong Teck Tsin* [2010] 9 MLJ 176, at p 184G–I; and

(b) *Minty Holdings Sdn Bhd v JB Properties Sdn Bhd (SK Brothers Realty, third party)* [1998] 7 MLJ 182.

[25] However, I agreed with the defendants' learned counsel that the two cases are distinguishable on facts and are, therefore, inapplicable to the present case.

[26] I noted that the first case concerned the application of the trite principle of law on pleadings and did not concern a claim for damages in lieu of specific

performance. In that case, the plaintiff claimed against the defendant for a share of the profits derived from the sale of a piece of land. In dismissing the plaintiff's claim after a full trial, the learned trial judge held that it is settled law that parties are bound by the pleadings and if there was a need to amend the pleadings, the plaintiffs ought to have applied for such amendment to the statement of claim. However, since this was not done, the learned trial judge held that the plaintiffs were not entitled in law to depart from their pleaded case.

[27] I noted that the second case concerned a claim for general damages for the wrongful lodgment of a caveat and, similarly, did not concern a claim for damages in lieu of specific performance. In that case, the learned High Court judge held that the onus was on the plaintiff to prove his loss but the plaintiff had totally failed to prove any actual or real damages. Hence, the the learned High Court judge held that the plaintiff was not entitled to be awarded the damages sought by him.

[28] Reverting back to the instant suit, the defendants' third claim for damages for loss of value of the subject property is a natural consequence of the decision of the Kuala Lumpur High Court dated 31 July 2012 that the plaintiff is liable to pay to the defendants damages in lieu of specific performance. As such, it is not a claim for special damages.

[29] The learned DR erred in failing to take into consideration that the defendants' counterclaim against the plaintiff was for an order of specific performance of the SPA pursuant to s 18(5) of the Specific Relief Act 1950.

[30] The learned DR also erred in failing to appreciate the fact that when the learned trial judge found that the termination of the SPA by the plaintiff was unlawful, specific performance would have been allowed had the subject property not been auctioned off. But since the subject property was already auctioned off, thereby, rendering the SPA no longer capable of being specifically enforced, the learned trial judge ordered the plaintiff to pay to the defendants damages in lieu of specific performance pursuant to s 18(4) of the Specific Relief Act 1950 (see the grounds of judgment of the High Court and the Court of Appeal).

[31] Based on my understanding of the grounds of judgment of the High Court, the damages in lieu of specific performance are to be assessed by the registrar as at the date of the judgment of the High Court, vis 31 July 2012, and not as at the date of the breach of the SPA, vis 13 August 2007.

[32] The auction took place on 14 March 2011, which was one year four months and 17 days before the date of the order of the High Court in favour of

the defendants, which is 31 July 2012. Hence, it was the learned DR's duty to assess the amount of damages to be awarded to the defendants for the loss suffered on 31 July 2012 by the defendants due to the unlawful termination of the SPA by the plaintiff on 3 August 2007 and to make an award of damages in lieu of specific performance in favour of the defendants to compensate the defendants, accordingly.

[33] The defendants relied on the auction price of the subject property as indicative of the market value of the subject property as at 31 July 2012. Therefore, the learned DR ought to have derived the amount of damages for the loss suffered by the defendants by deducting the purchase price from the auction price and, consequently, allow the defendants' third claim in encl 85 for the sum of RM850,000, being the difference between the auction price and the purchase price of the subject property.

[34] Had the plaintiff obtained a valuation report to state that the market value of the subject property on or before the date of the judgment is RM2,800,000, which is the same as the purchase price of the property stipulated in the SPA, then the learned DR would have been justified in not awarding any damages to the defendants in lieu of specific performance. But that did not happen in the instant case.

[35] It is trite law that damages in lieu of specific performance are damages for the loss suffered by an innocent party, which would substitute the relief of specific performance, and they are awarded in order to place the innocent party in a position he would have been in had the contract been performed as expected by him.

[36] Learned counsel for the defendants cited five cases in support of her submissions. The five cases are as follows:

(a) *Lee Tiow Kee & Anor v Ng Geok Hwa* [2017] 4 MLJ 92 (CA);

(b) *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491 (CA);

(c) *Riviera Promotions Sdn Bhd v Genting Perkasa Sdn Bhd & Ors* [2012] MLJU 875 (CA);

(d) *Nancy Simon d/o SP Simon v Peninsular Park Sdn Bhd* [2008] 7 MLJ 625; [2008] 10 CLJ 328 (HC); and

(e) *Ho Weng On & Anor v Bindev Sdn Bhd* [2007] 7 MLJ 607; [2007] 10 CLJ 277 (HC).

[37] In all the five cases, the court held that the proper measure of damages

in lieu of specific performance is the difference in the value of the property, vis the difference between the market value of the property and the purchase price of the property under the sale and purchase agreement.

[38] Reverting back to the instant appeal, the uncontroverted evidence before the learned DR in regard to the loss of value of the property is as follows:

(a) the purchase price of the subject property under the SPA was RM2,800,000 ('the purchase price') (see pp 1–15 of the defendants' bundle of documents);

(b) the subject property was, subsequently, sold by way of public auction on 14 March 2011, for a sum of RM3,650,000; and

(c) the auction price was RM850,000 more than the purchase price agreed upon by the parties in the SPA (see p 33 of the defendants' bundle of documents).

[39] Therefore, in the instant case, the measure of damages that would be a substitute for the relief of specific performance is the sum of RM850,000 being the amount of the loss of value of the subject property, which the learned DR ought to have ordered the plaintiff to pay to the defendants for having breached the SPA in, unlawfully, terminating the SPA on 3 August 2007.

[40] The payment of the sum of RM850,000, by the plaintiff to the defendants being the amount of the loss of value of the subject property, would put the defendants in the position in which they would have been had the plaintiff completed the SPA and transferred the subject property to the defendants pursuant to the SPA, vis they would be the new owners of the subject property valued at RM3,650,000 at the date of the decision of the High Court on 31 July 2012. Hence, this loss is, clearly a loss, which flowed, directly and naturally, from the plaintiff's unlawful refusal to complete the SPA. Therefore, the defendants' claim for damages for this amount of loss of the sum of RM850,000 in lieu of specific performance cannot be said to be a claim for special damages.

[41] The learned DR erred when he held that the defendants had every opportunity to amend their counterclaim and to, specifically, plead and pray for the loss of value of the subject property of a sum of RM850,000 as the sale of the subject property by way of public auction had taken place before the trial.

[42] I found that in so holding the learned DR had, completely, overlooked the fact that the defendants' claim for damages for loss of value of the subject property, which represents the loss suffered by the defendants arising from the

unlawful refusal of the plaintiff to complete the SPA and resulting in the subsequent auction of the subject property, could only be claimed if the court orders the plaintiff to pay to the defendants damages in lieu of specific performance.

[43] Therefore, it was pre-mature for the plaintiff to claim for the loss of value of the subject property before such an order was made by the learned trial judge. In any event, as stated above, a claim for loss of value of the property is not a claim for special damages, which is required by the RC 2012 and the law of procedure to be pleaded.

[44] In the circumstances, the learned DR erred in law in misconstruing the defendants' claim for the sum of RM850,000 being the damages, which the defendants were seeking for loss of value of the subject property suffered by the defendants, as at the date of judgment on 31 July 2012 by the Kuala Lumpur High Court, as a claim for special damages.

Issue (2): Whether the learned DR can override the decision of the trial judge dated 31 July 2012?

[45] I answered issue (2) in the negative. Below are my reasons.

[46] The defendants' counterclaim against the plaintiff for damages in lieu of specific performance of the SPA was allowed by the High Court on 31 July 2012 and the order of the High Court dated 31 July 2012 to that effect was affirmed by the Court of Appeal on 25 October 2013.

[47] It is clearly spelt out in the order of the learned trial judge dated 31 July 2012 that the plaintiff is to pay the defendants damages in lieu of specific performance to be assessed as the property was auctioned off on 14 March 2011 for RM3,650,000. Hence, the learned DR was only required to deal with the issue of the assessment of damages, vis to assess the quantum of damages by reference to the market value of the subject property at the date of judgment and not the market value of the subject property at the date of the breach, when the plaintiff, unlawfully, terminated the SPA on the ground of frustration.

[48] The decision of the learned DR in not granting any form of damages to the defendants has the effect of dismissing the defendants' claim against the plaintiff for damages in lieu of specific performance.

[49] It follows, therefore, that the decision of the learned DR is tantamount to defeating or overriding the order of the learned trial judge dated 31 July 2012 for damages in lieu of specific performance to be assessed, which the learned DR, certainly, was not in a position to do.

[50] In *UOB Kay Hian Pte Ltd v MA Boon Lan* [2014] 1 MLJ 874, the Court of Appeal held that 'the DR was merely carrying out the assessment of damages pursuant to the order made by the judge on 12 December, 2005. He was not in a position to override the order of the judge'.

[51] In the circumstances, I found that the learned DR erred in law in misconstruing the meaning and import of the learned trial judge's order and in, consequently, dismissing encl 85.

Issue (3): Whether the DR's delay of more than a year in rendering his decision on the assessment of damages has compromised his ability to decide encl 85?

[52] I answered issue (3) in the affirmative. Below are my reasons.

[53] It is apparent from the grounds of decision of the learned DR that the learned DR's delay of more than a year in rendering his decision on the assessment of damages has compromised his ability to decide encl 85.

[54] Had the learned DR given his decision soon after considering the written submissions filed by the defendants' solicitors, he would not have fallen into the error mentioned in issue (1) and issue (2) above.

[55] Hence, I agreed with Ms Vanaya Nambiar, learned counsel for the defendants, that on this ground, encl 115 has merits and ought to be allowed.

Issue (4): Whether the stamp duty and remedial costs are wasted expenditure?

[56] I did not answer issue (4). Below are my reasons.

[57] Broadly speaking, there are two main interests that the law seeks to protect in awarding damages, vis the plaintiff's expectation interest, and the plaintiff's reliance interest (*Civil Remedies* (2nd Ed), Sweet & Maxwell by Cheong May Fong and Lee Yin Harn, Chapter 4, Damages, at (4.008) at p 101).

[58] The protection of the expectation interest involves giving the plaintiff the value of the expectancy created by the defendant's promise. Damages awarded with this aim in mind are intended to place the plaintiff in the position 'so far as money can do it ... in the same situation ... as if the contract had been performed' (*Robinson v Harman* (1848) 1 Exch 850 at p 855).

[59] On the other hand, protection of the reliance interest involves undoing any harm caused to the plaintiff by his reliance on the defendant's promise. Damages awarded on this basis are intended to put the plaintiff in the position

he would have been in had the contract not been made. A

[60] As a general rule, the primary aim of awarding damages for breach of contract is the protection of the plaintiff's expectation interest. McGregor has named this measure 'the normal measure of recovery' and he has named the measure to protect the plaintiff's reliance interest as 'the alternative measure of recovery' (*McGregor, H, McGregor on Damages* London, Sweet & Maxwell, (19th Ed, 2014) 36 at (4-002) and 45 at (4-024), respectively). B

[61] The rationale for the protection of the plaintiff's expectation interest arises from the premise that a binding promise creates in the promisee an expectation of performance (*Commonwealth of Austrialia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, HCA at para 24 per Mason CJ and Dawson J). C

[62] Thus, the breach of such a binding promise requires, as a response, a remedy that would fulfil that expectation, hence, the terminology of 'expectation interest' (*Civil Remedies* (2nd Ed) Sweet & Maxwell by Cheong May Fong and Lee Yin Harn, Chapter 4, Damages, at (4.009), at p 102). D

[63] There are two possible measures of damages, which may be adopted to put a plaintiff into a position he would have been in had the contract been performed. E

[64] The first is the 'diminution in value' measure. What this means is taking the difference in value between what the plaintiff has received and what he expected to receive under the contract. F

[65] The second is known as the 'cost of cure' measure. What this means is taking what it would cost the plaintiff to procure some person other than the defendant to provide the full performance, which the defendant has failed to provide, or, in other words, the cost that the plaintiff would incur in obtaining substitute performance (Phang, A, *The Law of Contract in Singapore* (Singapore: Academy Publishers, 2012), 1497). G

[66] Both measures of damages can be seen in the illustrations to s 74 of the Contracts Act 1950. H

[67] Illustration (a) shows the application of the 'diminution in value' measure. It states as follows: I

> ILLUSTRATIONS
>
> (a) A contracts to sell and deliver 50 gantangs of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for

A which B might have obtained 50 gantangs of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

[68] Illustration (f) shows the application of the 'cost of cure' measure. It states as follows:

B

ILLUSTRATIONS

(f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

C

[69] It was the defendants' learned counsel's submission before the learned DR that the stamp duty and remedial costs are not wasted expenditure but rather the defendants' entitlement, which had resulted from the plaintiff's non-performance of the SPA and subsequent sale by auction of the subject property, which rendered the claim for specific performance by the defendants impossible.

D

[70] It was also the defendants' learned counsel's submission before the learned DR that if the learned DR decides that the stamp duty and remedial costs are wasted expenditure, then an election was made by the defendants to claim for the sum of RM850,000 being the diminution in the value of the property.

E

F **[71]** Before me, Ms Vanaja Dewi a/p CP Padmanabhan Nambiar, learned counsel for the defendants, conceded that in regard to damages, a party will be allowed to claim for either expectation interest (loss of bargain or profit) or reliance interest (wasted expenditure) but not for both (see *Anglia Television Ltd v Reed* [1972] 1 QB 60).

G

[72] Hence, for the purpose of this appeal, encl 115, the defendants have confined their claim for damages for loss of value of the subject property, vis the defendants' expectation interest, in light of the DR's correct decision that the stamp duty and remedial costs are wasted expenditure, vis the defendants' reliance interest.

H

[73] Therefore, there was no necessity for me to answer this issue in this appeal.

I *Issue (5): Whether the plaintiff is entitled to the equitable right of set off of a sum of RM738,814.83, being the total of the simple and compound interest, which have accrued from 28 April 2009–31 July 2011 plus 1% default interest for the same period; of a sum of RM200,066.84, being the shortfall from the auction of the subject property on 14 March 2011; and a sum of RM779,000, being the rental for*

the subject property at the rate of RM19,000 per month from September 2007 to February 2011?

[74] I answered issue (5) in the negative. Below are my reasons.

[75] I agreed with the defendants that in order to claim for an equitable right of set off, the plaintiff ought to make a plea of set off against the defendants' claim as per O 18 r 17 of the RC 2012. But this was not done. I noted that the claim for an equitable right of set off was only raised for the very first time in the hearing of encl 85 before the learned DR.

[76] I was of the respectful view that the failure of the plaintiff to plead the equitable right of set off in the endorsement of his claim on the writ is fatal to the plaintiff's claim.

[77] I noted that the cases cited by the plaintiff to support his claim for the equitable right of set off are cases where such a claim was raised in the defence. As such, the cases are not relevant to the facts of this case.

[78] Further, a person should not benefit from his own wrong. This is a trite principle of law (see the Court of Appeal case of *See Kui Seng Realty Sdn Bhd v Sam Yep Foo & Anor* [2014] 1 MLJ 410).

[79] In the instant case, the learned trial judge held that the termination of the SPA by the plaintiff was unlawful and, therefore, the plaintiff's claim, which included a claim for damages was dismissed. In such a situation, the plaintiff ought not to be permitted to take advantage of his own breach by raising the alleged claim for the set off.

[80] I noted that the plaintiff also alleged that he did not benefit from the auction as there was still a shortfall of a sum of RM200,066.84. I agreed with the defendants that whether the plaintiff benefitted from the auction or not is irrelevant to the assessment of damages in lieu of specific performance of the SPA. What is material and relevant is that based on the auction price of the subject property, the value of the subject property has increased by RM850,000. Had the plaintiff not breached the SPA and the subject property was transferred as per the terms of the SPA to the defendants, the defendants would have had the benefit of the subject property worth RM3,650,000. However, the defendants had been deprived of this benefit in terms of real value due to the plaintiff's breach of the SPA.

[81] I was of the respectful view that the plaintiff was not entitled to the claim for the sum of RM779,000 being the alleged rental at the rate of

RM19,000 per month from September 2007 to February 2011. This is because firstly, although the plaintiff did file an application at the initial stage of the suit for an order for the defendants to make payment in the sum of RM19,000 per month to the plaintiff under the old O 22A of the Rules of the High Court 1980 ('the RHC 1980') the plaintiff's application was dismissed by the High Court on its merits and the dismissal of his claim was upheld by the Court of Appeal.

[82] Secondly, the learned trial judge in the grounds of judgment gave, inter alia, the following grounds for the dismissal of the plaintiff's application:

(a) the plaintiff had not shown to the satisfaction of the court that the defendants 'may be held liable to pay' the sum claimed as required under O 22A of the RHC 1980; and

(b) the plaintiff did not provide any evidence to support the sum of RM19,000 claimed as rental.

[83] Hence, the doctrine of res judicata applies and the plaintiff cannot be allowed to raise the same issue at the hearing of encl 85 before the learned DR (see *Barbara Lim Cheng Sim v Uptown Alliance (M) Sdn Bhd & Ors* [2014] 8 MLJ 314; *Joseph bin Paulus Lantip & Ors v Unilever Plc* [2018] supp MLJ 151; [2012] 7 CLJ 693; and *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57).

Issue (6): whether the plaintiff can raise two new issues in the hearing of encl 115?

[84] I answered issue (6) in the negative. Below are my reasons.

[85] In the plaintiff's written submissions for encl 115, the plaintiff raised two new issues. I noted that the plaintiff did not proffer any authorities to support the two new issues, which he had raised in the hearing of encl 115 before me.

[86] The first issue is that the defendants are barred from claiming for damages for loss of value of the subject property as the subject property was never transferred to them.

[87] The second issue is that in the event, the court decides to award damages to the defendants in lieu of specific performance, the amount of the damages awarded can only be the equivalent to 10% of the purchase price of the subject property, vis a sum of RM280,000, pursuant to cl 7.5(c) of the SPA as that was what was agreed between the parties in the SPA and the plaintiff is also entitled to set off this sum against the total sum of interest accrued, vis RM738,814.83.

[88] I found that these two issues are new issues because they were not raised before the learned DR during the hearing of encl 85. In the circumstances, I agreed with the defendants that I ought not to take cognisance of the two new issues in arriving at my conclusion for encl 115.

[89] Be that as it may, I was of the respectful view that the plaintiffs' first new issue is misconceived and does not hold water as it goes against the grain of the trite law on specific performance and s 18 of the Specific Relief Act 1950.

[90] Section 18(1) of the Specific Relief Act 1950 provides that any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance. In the instant case, the defendants claimed for compensation in substitution for the performance of the SPA as the subject property was sold by public auction on 14 March 2011.

[91] Section 18(2) of the Specific Relief Act 1950 provides that if the court decides that specific performance ought not to be granted, but that there is a contract between the parties, which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. In the instant cae, the learned trial judge ordered the plaintiff to pay to the defendants damages in lieu of specific performance of the SPA as compensation for the plaintiff's breach of the SPA.

[92] Section 18(4) provides that compensation awarded under the section may be assessed in such a manner as the court may direct. In the instant case, the learned trial judge ordered that the damages in lieu of specific performance be assessed by the registrar.

[93] Section 18(5) provides that the circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by the section. In the instant case, even though the subject property was sold by public auction on 14 March 2011, the learned trial judge exercised the discretion conferred by s 18 of the Specific Relief Act 1950 and ordered the plaintiff to pay to the defendants damages in lieu of specific performance of the SPA as compensation for the plaintiff's breach of the SPA, to be assessed by the registrar.

[94] Section 18 of the Specific Relief Act 1950 states as follows:

18 Power to award compensation in certain cases

(1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.

(2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

ILLUSTRATION

A contracts to sell a hundred gantangs of rice to B. B brings a suit to compel A to perform the contract or to pay compensation. The court is of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B, but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

(3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

ILLUSTRATION

A contracts with B to sell him a house for RM1,000, the price to be paid and the possession given on the 1st of January. A fails to perform his part of the contract, and B brings his suit for specific performance and compensation, which is decided in his favour. The decree may besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

(4) Compensation awarded under this section may be assessed in such a manner as the court may direct.

(5) The circumstance that the contract has become incapable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.

ILLUSTRATIONS

(a) A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

(b) A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award A compensation for the non-performance. (Emphasis added.)

[95] It is pertinent to note that in a case, which involves the breach of an agreement for the sale and purchase of an immovable property, the remedy of specific performance is sought to compel the party, who has breached the agreement, to transfer the immovable property to the claimant (who is the

innocent party) as per the terms of the agreement. It goes without saying that if the property was already transferred to the claimant, there would be no reason to seek for specific performance of the agreement.

[96] It is also pertinent to note that in the instant case the defendants' claim for specific performance of the SPA was made pursuant to cl 7.8 of the SPA (see p 9 of the defendants' bundle of documents), which was to compel the plaintiff by way of specific performance to complete the sale of the subject property. However, before the Kuala Lumpur High Court could decide whether the claim for specific performance ought to be allowed or otherwise, the subject property was sold by public auction by the plaintiff's financier and thus, the SPA became incapable of being performed. As such, the learned trial judge allowed damages in lieu of specific performance under s 18(4) of the Specific Relief Act 1950.

[97] In light of the foregoing, the second new issue also has no merit as it is contrary to cl 7.8 of the SPA and s 18 of the Specific Relief Act 1950.

CONCLUSION

[98] Based on the above reasons, I found that in dismissing encl 85 the learned DR had acted on a wrong principle of law. This has resulted in a serious miscarriage of justice, which warranted the interference from this court (see *Topaiwah v Salleh* [1968] 1 MLJ 284).

[99] In the circumstances, I allowed the defendants' appeal. I, accordingly, set aside the decision of the learned DR dated 25 January 2017. I ordered the plaintiff to pay the defendants a sum of RM850,000 as damages in lieu of specific performance of the SPA together with interest thereon at 8%pa from 18 October 2016 until full settlement and costs of RM15,000.

Order accordingly.

Reported by Ashok Kumar